IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	CASE NO.: 1:16CR236
	)	
Plaintiff,	)	JUDGE PATRICIA A. GAUGHAN
	)	
v.	)	
	)	
ADAM LIBBEY-TIPTON,	)	RESPONSE IN OPPOSITION TO
	)	MOTION TO DISMISS
Defendant.	)	

The United States of America, by and through its counsel, David A. Sierleja, Acting United States Attorney, and Megan R. Miller, Assistant United States Attorney, hereby submits its response in opposition to Defendant Adam Libbey-Tipton's Motion to Dismiss Indictment (Doc. #27). For the reasons set forth below, the Motion is without merit and should be denied in its entirety.

I. INTRODUCTION

Defendant Adam Libbey-Tipton has been charged with receipt and possession of visual depictions of real minors engaged in sexually explicit conduct following a residential search warrant that resulted in the seizure of digital devices containing such images. Defendant was identified through an FBI investigation into a child pornography website, "Playpen," operating on the anonymous Tor network. In late February 2015, the FBI seized and assumed administrative control of the site—which had already been operating for six months—for approximately two weeks. During that period and pursuant to a warrant/Title III order obtained in the Eastern District of Virginia, the FBI deployed a Network Investigative Technique (a "NIT") and monitored Playpen traffic to identify and apprehend its users.[1]

Defendant's request for dismissal on alleged outrageous government conduct should be denied. The government's conduct was not unreasonable, let alone outrageous. The FBI did not create Playpen, nor did it induce Defendant to become a member. It did not post any child pornography or links to child pornography to the site, and it certainly did not inspire in the Defendant a desire to view and download child pornography. Rather, with 24/7 monitoring and having presented its plan to two different federal judges, the FBI seized on a fleeting opportunity to identify and apprehend pedophiles using an anonymous network to conceal their active participation in sexual exploitation of children.

The FBI's operation was a reasonable response to indisputable investigative challenges. While reasonable people may debate whether law enforcement could have used other methods to identify and capture such serious criminals, settled Sixth Circuit law makes clear that outrageous government conduct is conduct that shocks the conscience and offends fundamental notions of fairness. Applying those factors, there is no question that the government's conduct was not outrageous. Accordingly, Defendant's motion should be denied.

II. LEGAL STANDARDS

The Supreme Court has indicated, in dicta, that outrageous government conduct may be a basis for dismissing an indictment on due process grounds. *See United States v. Russell*,

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[1] A more detailed description of Playpen and the investigation of it are contained in the government's response to the defendant's motion to suppress.

411 U.S. 423, 431-32 (1973). To prevail on an "outrageous government conduct" defense, Defendant must show that law enforcement's conduct is "so outrageous that it violates 'fundamental fairness' or is 'shocking to the universal sense of justice.'" *United States v. Napier*, 787 F.3d 333, 341 (6th Cir. 2015) (quoting *Russell*, 411 U.S. at 431-32); *see also United States v. Allen*, 619 F.3d 518, 525 (6th Cir. 2010). Government conduct that is so outrageous to warrant dismissal is rare, and the standard for dismissal on this ground is "extremely high." *United States v. Smith*, 924 F.2d 889, 897 (9th Cir. 1991).

III. ARGUMENT

Settled Sixth Circuit law compels the denial of Defendant's motion. The FBI responded reasonably to a host of investigative challenges in an effort to apprehend individuals using technology to hide their active participation in the sexual exploitation of children. The targets of this investigation were not lured by the FBI but voluntarily chose to join a website dedicated to the sexual exploitation of children. Reasonable people may debate whether the FBI could have used other means to identify suspects, but that is not the test of outrageousness. Rather, Defendant must demonstrate that the government acted in a way that is so out of bounds as to shock the conscience. This it did not do, and the motion should be denied.

A. The Sixth Circuit Has Not Recognized the "Outrageous Conduct" Defense."

The Sixth Circuit has never applied the "outrageous government conduct defense" and has stated that "there are . . . strong reasons for concluding that such a defense simply does not exist . . . ." *United States v. Al-Cholan*, 610 F.3d 945, 952 (6th Cir. 2010) (quoting *United States v. Tucker*, 28 F.3d 1420, 1427 (6th Cir. 1994)). In rejecting the "outrageous government conduct" defense, the Court "look[s] to the doctrine of entrapment to assess a defense that sounds in inducement." *United States v. Amawi*, 695 F.3d 457, 483 (6th Cir. 2012); *see also*

United States v. Blood, 435 F.3d 612, 629 (6th Cir. 2006) ("We have held that the outrageous government conduct defense is not available where the defense is based either on a theory of government inducement, or on a theory that the undercover officer's involvement in creating [the] crime was so significant that criminal prosecution violates due process."). The Sixth Circuit declines to recognize the outrageous conduct defense in these circumstances because defendants attempt to use it to avoid having to disprove predisposition, which would otherwise be required if an analogous entrapment defense were asserted. *Amawi*, 695 F.3d at 485 (concluding that a defendant "may not circumvent this restriction by couching [his] defense in terms of 'due process'").

In his Motion to Dismiss, Defendant attempts to do precisely what *Amawi* proscribes—characterizing what is essentially an entrapment defense as a due process violation by claiming that the FBI provoked him to engage in his illegal conduct. In so doing, Defendant seeks to avoid having to disprove predisposition because he cannot establish an entrapment claim as a matter of law. Under established Sixth Circuit precedent, any entrapment claim would necessarily fail because Defendant could not prove that he was not predisposed to engage in illicit sexual behavior involving minors given the record evidence indicating his pedophilic tendencies. (*See, e.g.,* R. 16: Notice of 414 Evidence). Because the government merely provided an opportunity for Defendant to commit a crime to which he was already predisposed, his entrapment defense would fail as a matter of law. *See, e.g., United States v. Moore*, 916 F.2d 1131, 1136 (6th Cir. 1990). Defendant thus should not be allowed to recharacterize his defense into one of a constitutional variety to circumvent established case law.

B. Other Courts Routinely Dismiss the "Outrageous Conduct" Defense.

Even if the "outrageous government conduct" defense remains available in theory, "in practice, courts have rejected its application with almost monotonous regularity." *Al-Cholan*, 610 F.3d at 952 (quoting *United States v. Santana*, 6 F.3d 1, 4 (1st Cir. 1993). Indeed, no court has granted a motion to dismiss for "outrageous government conduct" on the theory that it was "outrageous" for the FBI to briefly operate the Playpen site to identify users. *See, e.g., United States v. Pawlak*, No. 16-CR-306, 2017WL661371 (N.D. Tex. Feb. 17, 2017; *United States v. Perdue*, No. 16-CR-305, 2017WL661378 (N.D. Tex. Feb. 17, 2017) (consolidated with *Pawlak*); *United States v. Kim*, No. 1:16-cr-191, 2017WL394498 (E.D.N.Y. Jan. 27, 2017); *United States v. Tran*, No. 16-10010, 2016WL7468995 (D. Mass. Dec. 28, 2016); *United States v. Vortman*, No. 16-cr-210, 2016WL7324987 (N.D. Cal. Dec. 16, 2016); *United States v. Hammond*, No. 16-cr-102, 2016WL7157762 (N.D. Cal. Dec. 8, 2016); *United States v. Owens*, No. 16-CR-38-JPS, 2016WL7079617 (E.D. Wis. Dec. 5, 2016); *United States v. Tippens, et al.*, No. 16-CR-5110 (W.D. Wa. Nov. 30, 2016); *United States v. Mascetti*, No. 16-cr-308 (M.D.N.C. Oct. 24, 2016); *United States v. Anzalone*, No. 15-cr-10347, 2016WL6476939 (D. Mass. Oct. 14, 2016); *United States v. Allain*, No. 15-cr-10251, 2016WL5660452 (D. Mass. Sept. 26, 2016); *United States v. Chase*, No. 15-cr-00015, 2016WL4639182 (M.D.N.C. Sept. 6, 2016); *United States v. Michaud*, No. 15-5351 (W.D. Wa. Jan. 22, 2016).

The Ninth Circuit has established an instructive framework for considering an "outrageous government conduct" defense. *See United States v. Black*, 733 F.3d 294, 302 (9th Cir. 2013). The Court in *Black* identified six factors that guide the outrageousness inquiry:

> (1) known criminal characteristics of the defendant[]; (2) individualized suspicion of the defendant[]; (3) the government's role in creating the crime of conviction; (4) the government's encouragement of the defendant[] to commit the offense conduct; (5) the nature of the government's participation in the offense conduct;

> and (6) the nature of the crime being pursued and the necessity for the actions taken in light of the nature of the criminal enterprise at issue.

Id. at 303. Applying these guiding principles to the totality of the circumstances, dismissal of the Superseding Indictment is unwarranted.

1. *The FBI reasonably suspected that Defendant and Playpen users access child pornography.*

The government had ample reason to believe that Playpen users, including Defendant, were unlawfully viewing and sharing child pornography. When the government seized Playpen, it admittedly had no reason to suspect Defendant because he had not yet been specifically identified as a member. It did, however, have ample reason to suspect that any member of Playpen was actively viewing and sharing child pornography.

As the affidavit in support of the NIT warrant explained, between September 2014 and February 2015, undercover FBI agents documented Playpen's content and attempted to identify site users. (R. 27-1: Affidavit in Support, PageID 231). Playpen was targeted precisely because its members were actively advertising and trading child pornography. (*Id.*, PageID 230-31). This illicit content was highly categorized according to the gender and age of the victims portrayed as well as the type of sexual activity depicted. (*Id.*, PageID 233-36). The images and videos comprised all manner of child sexual abuse, including "an adult male's penis partially penetrating the vagina of a prepubsent female" and "an adult male masturbating and ejaculating into the mouth of a nude, prepubescent female." (*Id.*, PageID 235-36). Tellingly, the subsection of Playpen that had the greatest number of postings was one focused on the sharing of hardcore pornographic images of preteen girls. (*Id.*, PageID 233-35). Playpen also featured image and file hosting and a chat forum, all of which allowed users to upload links to child pornography. (*Id.*, PageID 237-38). In other words, the NIT warrant affidavit showed that Playpen was "unmistakably dedicated to child pornography." *United States v. Michaud*, No. 3:15-CR-05351-RJB, 2016WL337263, at *5 (W.D. Wa. Jan. 28, 2016). The FBI thus had every reason to suspect that Playpen users—such as Defendant—were actively engaged in the sharing of child pornography.

2. *The FBI played no role in creating or encouraging Defendant's crime.*

The government also played no role in creating Defendant's crime. Playpen was operating long before the FBI seized it, and the government did not create the website or its content. The FBI bears no responsibility for Defendant's decision to sign up for Playpen or store the images and videos of child pornography that were recovered from his devices. The government likewise did not encourage Defendant's participation in the crime. At most, the government briefly operated a pre-existing website that Defendant used to access child pornography. Defendant's conduct predated the FBI's operation of Playpen. Defendant thus needed no encouragement from the government to commit his crime.

The government also was not responsible for Defendant's crime. The duration of the government's operation of Playpen was exceedingly brief: two weeks. Playpen itself operated for at least six months before that. The nature of the government's involvement as a participant on Playpen was passive. The FBI did not post any images, videos, or links to child pornography. Playpen's users were responsible for that content. Additionally, Defendant had the necessary technical expertise and resources to commit the charged crimes without the government's intervention. Defendant signed up for Playpen and accessed its content with no prompting from the FBI. He also encrypted several of his electronic devices to avoid law enforcement's detection of his crime. Defendant cannot blame the FBI for a crime that he alone is responsible for having committed.

3. *The FBI's conduct was reasonable and necessary under the circumstances.*

The government's conduct was necessary given the use of an anonymous network by dangerous offenders to conceal their locations and identities while engaged in the ongoing sexual exploitation of children. As the government explained to the judges who authorized the NIT and the Title III—and as those two judges apparently agreed—the brief, continued operation of Playpen in order to deploy the NIT was necessary to identify and apprehend individuals actively sharing child pornography. Defendant used technology to conceal his identity and location, not for fear of discovery of a lawful pursuit. To the contrary, Defendant sought a safe haven where he could share access child pornography without fear of law enforcement intervention. But for the government's investigation, Defendant and other offenders would have succeeded in remaining hidden. Indeed, the government explained in great detail the challenges posed by the technology that Defendant used and why other investigative alternatives were not likely to succeed. (R. 27-1: Affidavit in Support, PageID 237-38, 240-42).

Defendant maintains that the government should have gone about things differently. While entitled to his opinion, that is not the standard for outrageousness. Perhaps unsurprisingly, Defendant fails to account for the type of advanced technical means that he and other Playpen used employed. For the NIT to have an opportunity to work, however, members had to be able to continue to access the site, with as minimal interruption in the operation of the site as possible to avoid any suspicion that a law enforcement interdiction was taking place. Interruptions in the service of the Playpen website would be a tip-off to suspects that law enforcement infiltration was occurring.

Defendant claims that a host of alternatives involving some form of disruption of the ability of Playpen users to share and view illicit content would have accomplished the same goals and avoided the continued distribution of child pornography. The veteran agents who crafted and executed this investigation, however, disagreed. Their knowledge of the technology and the offender population, in addition to their investigative experience, told them that continued operation of Playpen was the best and perhaps only chance for identifying and apprehending dangerous predators. Defendant's preference for a less effective investigative technique is understandable—given that he was caught—but hardly relevant to the question of whether the government acted outrageously.

To be sure, agents considered seizing Playpen and removing it from existence immediately. And indisputably, doing so would have ended child pornography trafficking *on Playpen*. It should come as no surprise, however, that child pornography extends far beyond Playpen. Shutting down Playpen immediately would have squandered any hope of identifying and apprehending the offenders responsible for truly abhorrent conduct. It also would have frustrated agents' attempts to obtain information that could help identify and rescue child victims from ongoing abuse. Accordingly, the "investigative technique that was used" in this case was necessary given the "challenges of investigating and prosecuting the type of crime being investigated." *Black*, 733 F.2d at 309; *see also United States v. Vickers*, No. 16-3293, 2017WL1066572, at *3 (6th Cir. Mar. 21, 2017) ("We have repeatedly acknowledged that undercover operations targeting child pornographers . . . are severely needed to prevent and deter those who engage, often secretly, in these serious crimes which can have devastating effects upon society and, most importantly, upon children who are sexually abused.") (internal quotations and citation omitted).

C. Defendant Offers No Facts to Warrant a Finding of Outrageousness.

In seeking dismissal, Defendant relies on a hodgepodge of unsupported assertions of malfeasance by the FBI. These assertions are inaccurate and do not support a finding of outrageousness.

Defendant asserts without support that the government "increased the traffic to [Playpen] fivefold." (R. 27: Mot. to Dismiss, PageID 202). As explained by Special Agent Alfin, while it may appear at first blush that there were more visits during the two weeks of FBI control when compared to estimates of earlier activity, the actual numbers do not bear that out. (*See United States v. Tippens*, No. CR16-5110-RJB, R. 56-1: Declaration of SA Alfin ("Alfin Dec.") (W.D. Wa. Sept. 22, 2016), attached hereto as Ex. A). Those earlier estimates were based on averages that covered the period from the inception of the site to just a few weeks before the FBI took control. Information obtained from the site administrator shows that the level of activity did not change appreciably once the FBI took control of Playpen when compared to activity just before that period. (*Id.* at p. 4, ¶ 10). The FBI did not do anything to cause that increased traffic. Nor does Defendant offer any evidence that it did.

Defendant also asserts that the actions of Playpen's users required "the approval of" and "substantial technical support" from whoever operated the site, including the FBI. (R. 27: Mot. to Dismiss, PageID 202). This, again, is inaccurate. As explained by Special Agent Alfin, the FBI made no technical improvements to the website while it was under government control. (Alfin Dec. at p. 3, ¶ 5). Rather, users posted messages containing child pornography images and/or links to such images or videos without any need for administrative approval or technical assistance. While content posted by site users (both before and after the FBI assumed administrative control) generally remained available to site users for a limited time, removing all of that content would have jeopardized the investigation into the very users who were creating, posting, and viewing that content.

Defendant also criticizes the FBI for permitting the brief, continued distribution of child pornography by Playpen users. But stopping the unlawful possession and dissemination of child pornography and rescuing children from ongoing abuse and exploitation requires more than just shutting down a facility through which such materials are disseminated. Law enforcement must identify and apprehend the perpetrators. Here, the FBI briefly assumed administrative control over Playpen to do just that. And they did so after sharing their plan with two different federal judges, to whom it was explained that this was a necessary and appropriate investigative technique.

The decision whether to shut down a website like Playpen or to allow it to continue operating was a difficult one for law enforcement given that users would continue to be able to post and access child pornography. During the government's operation of Playpen, regular meeting were held to discuss the status of the investigation and assess whether the site should continue to operate. That assessment required a balancing of factors, including site users' continued access to child pornography, the risk of imminent harm to a child, and the need to identify and apprehend perpetrators. On March 4, 2015, after a brief two-week period of operation, it was determined that the balance of those factors weighed in favor of shutting down the website, notwithstanding the fact that the court authorization would have permitted it to continue longer.

IV. CONCLUSION

Reasonable people may debate whether the FBI could have used other methods to identify perpetrators like Defendant. That, however, is not the question before the Court. The government took reasonable steps to address a significant challenge to its ability to investigate and prosecute serious crimes against children. And it did so after fully disclosing its intentions to two different judges. Whatever may be said about the government's actions, it did not act outrageously and certainly not in a manner that offends fundamental notions of fairness. Defendant's motion should be denied in its entirety.

Respectfully submitted,

DAVID A. SIERLEJA
Acting United States Attorney

By: /s/ Megan R. Miller

Megan R. Miller (OH: 0085522)
Assistant United States Attorney
United States Court House
801 West Superior Avenue, Suite 400
Cleveland, OH 44113
(216) 622-3855
(216) 522-8355 (facsimile)
Megan.R.Miller@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of March 2017 a copy of the foregoing document was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. All other parties will be served by regular U.S. Mail. Parties may access this filing through the Court's system.

/s/ Megan R. Miller
Megan R. Miller
Assistant U.S. Attorney